

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

MARLENE HOPKINS, Individually, as  
Wrongful Death Heir, and as Successor-  
in-Interest to NORMAN HOPKINS, JR.,  
Deceased; and MICHELLE HOPKINS,  
and MICHAEL HOPKINS, as Legal Heirs  
of NORMAN HOPKINS, Deceased, and  
THE FLINTKOTE COMPANY, THE  
OFFICIAL COMMITTEE OF  
CLAIMANTS, and JAMES J.  
MCMONAGLE as the LEGAL  
REPRESENTATIVE FOR FUTURE  
ASBESTOS PERSONAL INJURY  
CLAIMANTS

Plaintiffs,

vs.

PLANT INSULATION COMPANY;  
UNIROYAL HOLDING, INC.;  
IMPERIAL TOBACCO CANADA  
LIMITED; SULLIVAN & CROMWELL  
LLP; and DOES 1 through 100,

Defendants

Civil Action No. 1:06-CV-00298-JJF

Related to Docket No. 22

**RESPONSE OF THE FLINTKOTE COMPANY TO REQUEST BY  
IMPERIAL TOBACCO CANADA LIMITED TO EXCEED PAGE LIMIT**

The Flintkote Company ("Flintkote" or "Debtor") responds to "Imperial Tobacco Canada Limited's Motion To Exceed Page Limit" (the "Motion").

In this case, Imperial Tobacco Canada Limited ("Imperial Tobacco") has already filed three pleadings containing legal argument: (1) "Brief Of Imperial Tobacco Canada Limited In Support Of Emergency Petition For An Order Of Transfer Pursuant To 28 U.S.C. § 157(b)(5)," (2) "Emergency Motion Of Imperial Tobacco Canada Limited For Immediate Entry Of A Provisional Order Or, In The Alternative, An Expedited Hearing Regarding Its Emergency Petition For An Order Of Transfer Pursuant To 28 U.S.C. § 157(b)(5)," and (3) "Reply Of Imperial Tobacco Canada Limited In Support Of Its Emergency Motion For Immediate Entry Of A Provisional Order." By these

pleadings, Imperial Tobacco purportedly set forth the basis for its Section 157(B)(5) motion, including an argument that the authorities it presented justified extraordinary relief in the form of an “emergency” provisional transfer order. Imperial Tobacco now wants to double the page limitation on its fourth legal memorandum to address an issue that it made a knowing decision not to address in any of its prior pleadings.

In all its briefing, Imperial Tobacco relies upon authorities regarding section 157(b)(5) transfer motions arising in the chapter 11 cases of only four debtors: A.H. Robins Company, Incorporated; Dow Corning Corporation; Pan American Corporation; and Federal-Mogul Global, Inc. Here, however, is what the courts in those cases said about the need for an abstention analysis in connection with a section 157(b)(5) motion:

- “A motion under section 157(b)(5) . . . requires an abstention analysis.” In re Pan American Corp., 950 F.2d 839, 844 (2nd Cir. 1991) (emphasis added). “[T]he Bankruptcy Code ‘allows abstention for personal injury cases’ and only ‘where abstention does not occur will the requirement for adjudication in the district court take effect.’” Id.
- “Finally, a Section 157(b)(5) motion requires an abstention analysis.” In re Dow Corning Corp., 86 F.3d 482, 497 (6th Cir. 1996) (emphasis added).
- District Court is entitled to exercise its discretion and abstain under 28 U.S.C. § 1334(c)(1). In re Federal-Mogul Global, Inc., 282 B.R. 301, 314 (Bankr. D. Del.), mandamus denied, 300 F.3d 368 (3rd Cir. 2002), cert. denied, 537 U.S. 1148 (2003).
- District court had the power to allow products liability cases to be tried where the claim arose. A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1010 (1986).

Based on its own authorities, Imperial Tobacco knew that an abstention analysis was required under section 157(b)(5).<sup>1</sup> Indeed, such an analysis is done prior to addressing the section 157(b)(5) issues.

[I]n liquidating tort cases in bankruptcy, the district court would first decide whether it should leave the cases with respect to which claims have been filed in the bankruptcy court in the courts in which they are pending and then, if it decides against this course, the district court must try the cases itself or send them to the federal court for the district in which they arose.

Citibank, N.A. v. White Motor Corp. (In re White Motor Credit), 761 F.2d 270, 273 (6th Cir. 1985) (emphasis added).

By its Motion, Imperial Tobacco offers no explanation of why it made the tactical decision to ignore the threshold issues of discretionary and mandatory abstention in its efforts to obtain “emergency” relief from this Court, or why it is fair to Flintkote to double the pages available to Imperial Tobacco to address this threshold issue for the first time its fourth pleading in this matter; *i.e.*, at a point in the proceedings where Flintkote will not be entitled to respond without leave of this Court. Flintkote complied with the page limitations of this Court. Why can’t Imperial Tobacco? Imperial Tobacco had its chance to brief this threshold issue fully in any of its prior three briefs, and chose not to.

### **CONCLUSION**

Based on the facts and analysis set forth in Flintkote’s response to Imperial Tobacco’s Section 157(b)(5) motion, Flintkote does not believe that 20, 40 or 80 pages of briefing by Imperial Tobacco on the issues of discretionary or mandatory abstention is going to change the outcome of this matter. Nor does Flintkote believe that on the facts of this case Imperial Tobacco will be the first to convince a court to transfer a case under section 157(b)(5) over the objection of the Debtor away from a forum chosen

<sup>1</sup> Imperial Tobacco argues that “[a]bstention is typically raised by separate motion.” Motion at 2. Not only is there no authority for this statement, in the very cases upon which Imperial Tobacco relies there is no indication that a separate abstention motion was filed in respect to this threshold issue under section 157(b)(5).

by the Debtor; will be able to convince this Court to find subject matter jurisdiction where none exists; or will be able to establish a basis under section 157(b)(5), over the objection of the Debtor, to move from a jurisdiction with personal jurisdiction over Imperial Tobacco to one where Imperial Tobacco intends to contest jurisdiction.

Because Imperial Tobacco should be required to live with its own tactical decisions, the Motion should be denied. If, however, this Court determines to grant the Motion, Flintkote, upon request by this Court, would be pleased to respond to any issue raised by Imperial Tobacco that gives the Court any pause in denying Imperial Tobacco's ill-conceived and unfounded Section 157(b)(5) Motion.

Dated: May 25, 2006

PACHULSKI STANG ZIEHL YOUNG JONES  
& WEINTRAUB LLP



Laura Davis Jones (Bar No. 2436)  
James E. O'Neill (Bar No. 4042)  
919 North Market Street, 17<sup>th</sup> Floor  
P.O. Box 8705  
Wilmington, DE 19899-8705 (Courier 19801)  
Telephone: (302) 652-4100  
Facsimile: (302) 652-4400

THE LAW OFFICE OF ALAN PEDLAR,  
A PROFESSIONAL CORPORATION  
1112 Via Malibu  
Aptos, California 95003  
Telephone: (831) 688-2667  
Facsimile: (831) 401-2402

SNYDER MILLER & ORTON LLP  
Stephen M. Snyder (CA State Bar No. 054598)  
James L. Miller (CA State Bar No. 071958)  
111 Sutter Street, Suite 1950  
San Francisco, CA 94104  
Telephone: 415-962-4402  
Facsimile: 415-962-4401

KELLY C. WOOSTER, ESQ.  
P. O. Box 62  
Copperopolis, CA 95228  
Telephone: (209) 785-2437  
Facsimile: (209) 785-8455

MORGENSTEIN & JUBELIRER  
Eliot S. Jubelirer (CA State Bar No. 061654)  
Jean L. Bertrand (CA State Bar No. 083250)  
One Market, Spear Street Tower 32nd Floor  
San Francisco, CA 94105  
Telephone: (415) 901-8700  
Facsimile: (415) 901-8701

Co-Counsel for the Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
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DOES 1 through 100,


Defendants.

Civil Action No. 1:06-CV-00298-JJF

**CERTIFICATE OF SERVICE**

I, James E. O'Neill, hereby certify that on the 25<sup>th</sup> day of May 2006, I caused a copy of the following document(s) to be served in the manner indicated on the individuals on the attached service list(s):

**RESPONSE OF THE FLINTKOTE COMPANY TO REQUEST BY  
IMPERIAL TOBACCO CANADA LIMITED TO EXCEED PAGE LIMIT**

  
James E. O'Neill (Bar No. 4042)

Flintkote District Court Service List  
Case No. 06-298-JJF  
Doc. # 118154  
005 – Hand Delivery  
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**HAND DELIVERY**

***(Co-Counsel for Debtors and Plaintiff,  
The Flintkote Company)***

James E. O'Neill  
Laura Davis Jones  
Pachulski, Stang, Ziehl, Young, Jones  
& Weintraub P.C.  
919 North Market Street, 17th Floor  
P.O. Box 8705  
Wilmington, DE 19899-8705

**HAND DELIVERY**

***(Office of the United States Trustee)***

David Klauder, Esquire  
Office of the United States Trustee  
844 King Street, Lock Box 35, Room 2311  
Wilmington, DE 19801

**HAND DELIVERY**

***(Counsel to the Official Committee of  
Asbestos Personal Injury Claimants)***

Marla Eskin, Esquire  
Campbell & Levine, LLC  
800 King Street, Ste 300  
Wilmington, DE 19801

**HAND DELIVERY**

***(Counsel to the Legal Representative  
for Future Claimants)***

Edwin J. Harron  
Young Conaway Stargatt & Taylor  
1000 West Street, 17<sup>th</sup> Floor  
Wilmington, DE 19801

**HAND DELIVERY**

***(Counsel for Defendant Imperial  
Tobacco Canada Limited)***

Stephen M. Miller  
Brett D. Fallon  
Carl N. Kunz, III  
Morris, James, Hitchens & Williams LLP  
222 Delaware Avenue, 10<sup>th</sup> Floor  
Wilmington, DE 19801

**FIRST CLASS MAIL**

***(Co-Counsel for Defendant Imperial  
Tobacco Canada Limited)***

L. Joseph Loveland  
James A. Pardo, Jr.  
Mark M. Maloney  
King & Spalding LLP  
1180 Peachtree Street, N.W.  
Atlanta, GA 30309

**FIRST CLASS MAIL**

***(Co-Counsel for Debtors and  
Plaintiff, The Flintkote Company)***

Jeffrey E. Bjork, Esquire  
Sidley Austin Brown & Wood LLP  
555 W. 5<sup>th</sup> Street, Suite 4000  
Los Angeles, California 90013

**FIRST CLASS MAIL**

***(Counsel to the Official Committee of  
Asbestos Personal Injury Claimants)***

Elihu Inselbuch, Esquire  
Rita Tobin, Esquire  
Caplin & Drysdale, Chartered  
375 Park Avenue, 35<sup>th</sup> Floor  
New York, NY 10152-3500

**FIRST CLASS MAIL**

***(Counsel to the Official Committee of  
Asbestos Personal Injury Claimants)***

Philip E. Milch  
Campbell & Levine, LLC  
1700 Grant Building, 310 Grant Street  
Pittsburgh, PA 15219

**FIRST CLASS MAIL**

**(Counsel to the Legal Representative  
for Future Claimants)**

Matthew E. Albers  
Vorys, Sater, Seymour & Pease LLP  
2100 One Cleveland Ctr.  
1375 E. 9th St.  
Cleveland, Ohio 44114

**FIRST CLASS MAIL**

**(Counsel for Plaintiff, The Flintkote  
Company)**

Stephen M. Snyder, Esquire  
Snyder Miller & Orton LLP  
111 Sutter, Ste 1950  
San Francisco, CA 94104

**FIRST CLASS MAIL**

**(Counsel for Plaintiff, The Flintkote  
Company)**

Eliot S. Jubelirer  
Morgenstein & Jubelirer  
One Market  
Spear Street Tower, 32<sup>nd</sup> Floor  
San Francisco, CA 94105

**FIRST CLASS MAIL**

**(Counsel for Plaintiff, The Flintkote  
Company)**

Alan Pedlar, Esquire  
The Law Office of Alan Pedlar  
1112 Via Malibu  
Aptos, CA 95083

**FIRST CLASS MAIL**

**(Counsel for Plaintiff, The Flintkote  
Company)**

Kelly C. Wooster, Esquire  
112 Rock Creek Court  
P.O. Box 62  
Copperopolis, CA 95228

**FIRST CLASS MAIL**

**(Counsel for Plaintiff Marlene Hopkins,  
Michelle Hopkins and Michael Hopkins)**

Gilbert L. Purcell, Esquire  
Brayton Purcell, LLP  
222 Rush Landing Road  
Novato, CA 94948

**FIRST CLASS MAIL**

**(Counsel for Sullivan & Cromwell)**

Gregory D. Phillips  
Rohit K. Single  
Brad D. Brian  
Munger, Tolles & Olsen LLP  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, CA 90071

**FIRST CLASS MAIL**

**(Counsel for Plant Insulation)**

Monte S. Travis  
Travis & Pon  
2001 Fillmore Street  
San Francisco, CA 94115

**FIRST CLASS MAIL**

**(Counsel for Uniroyal Holdings, Inc.)**

Nancy E. Hudgins  
Uniroyal Holdings, Inc.  
565 Commercial Street, 4<sup>th</sup> Floor  
San Francisco, CA 94111

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